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IN THE

Supreme Court of the United States

October Term 1991

CONSTRUCTIVIST FOUNDATION, INC., F/K/A
LEE FOUNDATION, INC.,

Petitioner,

v.

DEKALB COUNTY BOARD OF
TAX ASSESSORS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

Paula Fitzgerald Wolff
11489 Lake Potomac Drive
Potomac, Maryland 20854
(301) 299-2920

Counsel of Record
For the Constructivist
Foundation, Inc.

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

QUESTIONS PRESENTED FOR REVIEW

I. Does Georgia Statute O.C.G.A. Sec. 48-5-29(a), which requires aggrieved taxpayers to pay their ad valorem property taxes before the Superior Courts of Georgia will assume jurisdiction in the judicial appeal of the assessment of those taxes, deprive impoverished entities claiming tax exempt status of their Constitutional Rights?

A. Does O.C.G.A. Sec. 48-5-29(a) deprive impoverished entities claiming tax exempt status of their due process rights in violation of the Fourteenth Amendment by unnecessarily burdening them with the prereview payment requirement?

B. Does O.C.G.A. Sec. 48-5-29(a) create an undue burden depriving impoverished entities claiming tax exempt status of the opportunity to appeal their ad valorem tax assessment in violation of the Equal Protection Clause of the Fourteenth Amendment?

II. Does notice by publication of court proceedings, as permitted by Georgia Uniform Superior Court Rule 8.3, meet the Due Process standards for out-of-state, pro se litigants whose addresses are known to the court and the parties?

LIST OF PARTIES AND RULE 29.1 STATEMENT

1. Constructivist Foundation, Inc., F/K/A/ Lee Foundation, Inc.

2. DeKalb County Board of Tax Assessors

* Pursuant to S. Ct. R. 29.1, Petitioner The Constructivist Foundation is a Georgia, nonprofit Foundation which has no parents, affiliates or subsidiaries. The Foundation has its local office in Potomac, Maryland.

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CONSTRUCTIVIST FOUNDATION, INC., F/K/A LEE FOUNDATION, INC.,

Petitioner,

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DEKALB COUNTY BOARD OF TAX ASSESSORS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, the Constructivist Foundation, F/K/A Lee Foundation, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia, entered in the above-entitled proceeding on 27 November 1991.

DECISIONS BELOW

On 8 April 1991 the DeKalb County Superior Court dismissed with prejudice Petitioner/Foundation's appeal of its ad valorem real property tax

assessment for tax year 1990. The rationale for the dismissal, according to the order of dismissal, was first, Petitioner/Taxpayer's failure to pay its disputed taxes in accordance with O.C.G.A. Sec. 48-5-29 (a), and second, because Petitioner/Taxpayer, which had notice neither of the Motion to Dismiss nor of the hearing on the motion, failed to make an appearance at that hearing. (see Appendix.)

Petitioner appealed the dismissal to the Supreme Court of Georgia, raising the same Constitutional issues which it presents in this Petition. On 27 November 1991 the Supreme Court of Georgia affirmed the judgment below, without rendering an opinion. (see Appendix.)

On 18 December 1991 Petitioner's Motion for Reconsideration was denied, again without an opinion although one was requested. (see Appendix.)

JURISDICTION

On 8 April 1991 the Superior Court of DeKalb County, Georgia dismissed Petitioner's tax appeal.

On 27 November 1991 the Supreme Court of Georgia affirmed the dismissal below.

On 18 December 1991 the Supreme Court of Georgia denied Petitioner's Motion for Rehearing.

On 2 March 1992 Justice Anthony M. Kennedy granted Petitioner's application for an extension of time to file its petition for writ of certiorari, extending the time to and including 26 April 1992.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257 (a) (1988).

STATUTES INVOLVED

The Constitutional provisions, statutes and ordinances involved are reprinted in the attached Appendix. The citations are as follows: U.S. Const. Amendments V and XIV; 47 Stat. 1474, as amended, 49 Stat. 911, 11 U.S.C. Sec. 205, Sec. 77(c)(8) (1935); 28 U.S.C. 1257(a) (1988); U.S. Supreme Court Rule 29.1; Ga. Statute O.C.G.A. Secs. 48-5-29(a)(1981), and 48-5-311(f)(1) (1991); Ga. Uniform Superior Court Rule 8.3 (1985).

STATEMENT OF THE CASE

The Constructivist Foundation, F/K/A Lee Foundation, is a private, nonprofit Georgia Corporation, which was established on 18 March 1963 for educational purposes. The Foundation's corporate activities and purposes now include educational, scientific, literary, artistic, medical, religious, welfare and other charitable activities, including assisting other similar charitable organizations. The corporate headquarters of the Foundation are now located in Potomac, Maryland. The Foundation has had U.S. and State of Georgia tax exempt status continuously since its incorporation.

Among the Foundation's corporate assets is a ten plus acre parcel of land improved by a 22,000 sq. ft. school building located in DeKalb County, Georgia. This property (zoned .5 acre single family residence with a special use for the school), which the Foundation has owned since November 1965, was initially leased by a private, nonprofit, early childhood school and day care center. This school was the first integrated, inter-denominational, Montessori

school in Georgia. The DeKalb County Tax Board granted an exemption under Georgia law to the Foundation from ad valorem taxes on subject property starting in 1965.

The nonprofit school was closed in 1976 for lack of funds. After June of 1977 the property was leased briefly to a private, profit making school, whereby the exemption from ad valorem taxes ceased. Then, from December 1978 until 1985, the property was again leased to a nonprofit school. Nonetheless, real estate taxes amounting to approximately $6,000.00 per year were still being assessed by the County, the Foundation paying them under protest.

From 1 February 1985 to late 1987 the Foundation leased, at subsidized rates, part of the site to Faith Cornerstone Corporation, an Evangelical church with both U.S. and State of Georgia tax exempt status. The Foundation stored its educational equipment on the remaining portion of the property and allowed the Church to use some of that equipment for its educational programs. Still the applications by the Foundation for exemption from ad valorem property taxes were denied because the DeKalb County tax commissioner considered the lease primarily as income production activity by the Foundation. The annual ad valorem tax bill for the property, at that point, was approximately $9,000.00.

Starting in 1988, the same Church used part of the property in exchange for sharing the expenses for the upkeep of the property with the same use of the educational equipment. Still, the Foundation's application for at least a partial exemption, if not a complete exemption, from ad valorem taxes for the 1988 tax year was denied. Instead the tax value doubled to over $1,600,000.00, and the tax bill in-

creased to $29,906.16.

The exemption was again denied in 1989, and after the Foundation exhausted all of its administrative procedures with regard to its 1989 ad valorem tax bill, it appealed that assessment to the Superior Court of DeKalb County, Georgia. At this point the Foundation, which could not afford to hire an attorney, was proceeding pro se, and the Court dismissed the appeal for delay in filing the brief. The motion for a rehearing was denied.

The County tax assessors had stated that the request for exemption from the 1989 assessment was denied because aiding religious activity was not included among the nonprofit activities authorized in the Foundation's initial charter. Therefore, in 1989 the Foundation amended its charter to include any type of charitable activity, including religious activity. Nevertheless, the Foundation's application for an exemption from its 1990 ad valorem taxes was denied, and taxes were assessed based on a new higher valuation of the property of $1,623,500.00.

The Foundation appealed the 1990 assessment to the DeKalb County Board of Tax Assessors arguing that the property qualified for an exemption from ad valorem taxes under Georgia law because 1) it was not making a profit on the church's contributions to the upkeep of the property but rather was subsidizing the Church by proving space at 30% of value, and 2) that at least the 50% portion of the property, where the Foundation stored and had its educational materials used, qualified for an exemption. In the alternative, the Foundation showed that the valuation was excessive because 1) the value of the property was diminished by at least 60% because of its location on a flood plain, and 2) the building was and continues to be in desperate need of

repair rendering even the recent independent appraisal of $750,000.00 unrealistically high. On 11 July 1990 the Board of Tax Assessors informed the Foundation that they found the 1990 assessment to be valid.

The Foundation, still proceeding pro se, appealed next to the Board of Equalization. This resulted in only a minor reduction in the valuation of the property, from $1,623,500.00 to $1,466,700.00, saddling the Foundation with a tax bill for that year of $23,320.54. The opinion of the Board failed substantially to comply in form and substance with the Georgia law requirements for such an opinion. Thus, the Foundation appealed to the Superior Court of DeKalb County, Georgia.

According to the standard procedures in such appeals, the DeKalb County Attorney's Office filed the initial suit papers in the Superior Court, according to them as a service to the taxpayer. They did not send the Foundation a copy of the suit papers for over one year despite numerous requests. On 29 March 1991 the County Attorney filed a motion to dismiss, but the Foundation did not receive a copy of that motion until January of 1992 because it was missent. Nor did the Foundation receive any notice of the hearing on the motion to dismiss, as the only notice of the hearing was publicized in a local, DeKalb County newspaper to which the Foundation, with its principle office in Maryland, had no access. The hearing on the motion to dismiss took place on 8 April 1991, and the case was first dismissed because the Foundation had not complied with O.C.G.A. Sec. 48-5-29 (a) which provides that Superior Court will not assume jurisdiction of a tax appeal unless the contested taxes are prepaid, and secondarily on the basis of the Foundation's nonappearance at the hearing.

STAGE WHERE CONSTITUTIONAL ISSUE RAISED

The Foundation appealed the dismissal of its tax appeal by the Superior Court of DeKalb County to the Supreme Court of Georgia on Constitutional grounds. Due Process and Equal Protection issues were unambiguously raised by the Foundation in its Enumerations of Errors which accompanied its Appeal Brief and its Supplemental Appeal Brief, and those issues were developed in the Briefs. The Supreme Court of Georgia, without rendering an opinion, on 27 November 1991, affirmed the dismissal by the court below. The Foundation filed a timely Motion for Reconsideration, notifying the court of its intention to bring this matter before the United States Supreme Court if necessary, and requesting an opinion. Citing a Georgia Supreme Court Rule as authority for not providing an opinion, the Georgia Supreme Court denied the Motion for Reconsideration on 18 December 1991.

REASONS FOR GRANTING THE WRIT

This Court should grant this Petition for a Writ of Certiorari because of the urgent need to remedy the deprivation of fundamental Constitutional rights caused by Georgia Statute O.C.G.A. Sec. 48-5-29(a) and similar legislation in numerous other states as applied to impoverished and/or non-profit real property owners.

Also, this Court needs to invalidate the Georgia Superior Courts' use of notice by publication to an out-of-state party whose address was well known to the court and parties, and in whose absence

dismissal with prejudice was the likely outcome. The basis for rejecting notification by publication in such circumstances has already been clearly established by this Court numerous times before, and the lower courts should not continue to ignore this Court's rulings.

This Court should take particular notice that the instant case is not attacking the rights of states to assess or collect taxes when due, nor the actual collection process. Rather, it is attacking a procedure which denies impoverished entities their due process rights to appeal. Therefore the customary reticent approach taken by this Court in its consideration of most state tax legislation is not appropriate in this case.

I. THE REQUIREMENT OF O.C.G.A. SEC. 48-5-29(a) THAT AGGRIEVED TAXPAYERS MUST FIRST PAY THEIR DISPUTED AD VALOREM PROPERTY TAXES BEFORE THE SUPERIOR COURT WILL ASSUME JURISDICTION VIOLATES IMPOVERISHED ENTITIES' CONSTITUTIONAL RIGHTS.

Georgia law O.C.G.A. Sec. 48-5-311(f)(1) provides that an aggrieved taxpayer may appeal a decision of the County Board of Equalization to the Superior Court in the county where the property lies. O.C.G.A. Sec. 48-5-29(a) sets forth the jurisdictional requirement which must be met before the superior court will entertain the tax appeal by requiring aggrieved taxpayers to pay the ad valorem property taxes assessed against the property at issue for the last year for which taxes were finally determined to be due on the property.

Petitioner's primary contention is that, under due process standards, the right of impoverished

and/or tax exempt entities to appeal their ad valorem property tax assessments should not be contingent upon prereview payment of the disputed tax bill. This contention is based on the fact that such entities often have a valid argument that the disputed assessment is incorrect - either too high, or, as in the case of this petitioner, all together improper. Yet, under prereview payment requirements, such as those in O.C.G.A. Sec. 48-5-29(a), when an impoverished taxpayer is not able to pay those taxes in a timely fashion, the right to bring that appeal is lost. The impoverished taxpayers inability to pay, subjects the property to a tax sale. This prereview payment requirement is doubly unfair to many taxpayers whose property is then sold for taxes, because even if the taxes are collected at a tax sale, the taxpayer is provided no post-collection review on the issue of improperly assessed taxes.

This Court has clearly established the requirement for Constitutional due process safeguards against unlawful tax exactions in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, et al*, 110 S. Ct. 2238 (1990). The *McKesson* safeguards, which may be in the form of either prereview or post-review payments, are not met when prereview payment is not a realistic option for taxpayers. In theory, the prereview payment requirement can be remedied by post-review refunds. In practical application, however, the prereview payment requirement can result in devastating and disproportionate hardship for impoverished, aggrieved property owners who need to appeal their assessment and cannot first pay the contested taxes. Such was the situation which faced the Foundation in this case. The right to a judicial appeal should not be so heavily burdened that it is in essence precluded, thus causing irreparable harm to impoverished entities.

The *McKesson* safeguards need to be further defined by this Court to resolve the inconsistency in the protection of essential due process rights among the states in their treatment of ad valorem tax appeals, especially for entities which claim to be exempt. A partial survey by Petitioner found that Alabama, Arizona, California, District of Columbia, Florida, Massachusetts, Michigan, Ohio, Pennsylvania, South Carolina,and Texas have legislation requiring some form of prereview payment requirement for ad valorem tax appeals. Among those states which require prereview payment, New Jersey, Illinois, and Virginia seem to recognize the due process implications for certain impoverished taxpayers and so make an exception for tax exempt entities. Tennessee law seems particularly fair in requiring prereview payment only of the undisputed amount of the tax. Connecticut requires prereview payment when the tax is over $2,000. New York, North Carolina, Delaware, and Maryland do not require any prereview payment. Thus, the protection of essential Constitutional rights, which should be uniform, varies considerably among the states.

Impoverished taxpayers are particularly affected by the prereview payment requirement in the present depressed economic climate because the property often was assessed when property values were inflated, while now the property values have diminished substantially. However, the loss of tax income has made local governments almost rapacious in levying taxes. Never has the famous dictum, "The power to tax involves the power to destroy" been truer. Impoverished taxpayers have lost their right to appeal and most probably will lose their property if a tax sale ensues. This is particularly true where the mortgage on the property is accelerated if the taxes are not paid, allowing the mortgagor to proceed to sell the property. Such is the

situation for the Foundation in the instant case. This Court needs to reevaluate the standards necessary to protect taxpayers' Constitutional rights from abuse by tax hungry local governments. Only this Court can provide the needed guidance for the states in preserving the basic rights of the citizens of this country in these precarious economic times.

In the most disturbing turn of events, the Tax Equalization Board has said recently that it will not rule on the Foundation's tax exempt status, as the Georgia courts should decide that issue. Since the Georgia Courts will not entertain the tax appeal unless the Foundation pays the taxes which it is contesting and which it cannot afford to pay, a resolution of the Foundation's tax status is impossible until this Court rules that under traditional due process requirements the Foundation's appeal can proceed without the prereview payment of disputed taxes.

The loss of the right to appeal and the concomitant loss of one's property, the consequences of an impoverished taxpayer's inability to make the prereview payment, are not mere economic burdens, but rather devastatingly irreparable consequences which destroy basic economic rights. The resulting hardship for the noncomplying taxpayer is completely disproportionate to the state's valid interest in a sound fiscal policy and financial stability. The state's interests are already well protected by the state's statutory priority lien on the subject property and other protective measures are available to the state, such as substantial penalties for late tax payments. The delay in collection of revenue resulting from allowing for the appeal without prereview payment of disputed taxes is (to the extent that taxpayer does not prevail in its appeal) proportionately less burdensome for the state than the losses

caused to a noncomplying impoverished taxpayer under the operation of O.C.G.A. Sec. 48-5-29(a) - irreparable harm from the loss of the subject real property, a unique asset, which taxpayer will most likely never be able to afford to reacquire.

In the instant case, the Foundation is not the typical aggrieved ad valorem taxpayer attempting to have its assessment lowered; but rather, the Foundation by Georgia law is not a taxpayer at all, and is attempting to show the Court that it is entitled to the ad valorem tax exemption which the County had recognized for so many years. In the case of charitable entities such as the Foundation, the fiscal risk for the state is particularly minimal because such entities, which are not numerous, are not even taxpayers at all and should not be paying the ad valorem property taxes.

Under O.C.G.A. Sec. 48-5-29(a) only the wealthy can bring an appeal of their property tax assessment. The rest have to lose forever their right to a judicial appeal of the assessment and can anticipate losing their subject property in a tax sale. Thus, the analysis of Georgia Statute Sec. 48-5-29(a) does not warrant the traditional rational scrutiny test by which most tax legislation is reviewed, but rather warrants the strict scrutiny test, under which laws must be narrowly tailored or necessary to further a compelling state interest which cannot be otherwise protected, in order to pass Constitutional muster.

For the above reasons, amplified below, it is vitally important that the Court grant certiorari to resolve the far reaching, critical Constitutional issues presented by Petitioner in this case.

A.- O.C.G.A. SEC. 48-5-29(a) VIOLATES IMPOVERISHED ENTITIES' DUE PROCESS RIGHTS.

This Court recently recognized the Due Process implications of an improper tax exaction in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, et al*, 110 S. Ct. 2238 (1990). *McKesson*, a Commerce Clause case, addressed the Constitutionality of the excise tax scheme in the State of Florida which required taxpayers who failed to remit their taxes in a timely fashion to pay those taxes first before obtaining a review of the tax's validity. The Court in *McKesson* stated the following with regard to such prereview payments: "....a state must provide procedural safeguards against an unlawful tax exaction because such exaction constitutes a deprivation of property under the Due Process Clause." *McKesson*, at 2238.

The Court went on to describe how a state might implement those safeguards:

> A state may do so either by providing a form of predeprivation process - e.g., by authorizing taxpayers to sue to enjoin imposition of the tax prior to its payment or to withhold payment and then interpose their objections as defenses in a state-initiated tax enforcement proceeding - or by providing retrospective relief as part of its postdeprivation procedure. *McKesson* , at 2241.

In *McKesson*, this Court found that the requirement for prereview payment of contested taxes was unobjectionable only if proper postdeprivation remedies existed. The predeprivation requirements were not under attack in *McKesson*, but rather the

failure to provide postdeprivation relief. The allowance of predeprivation requirements was dictum discussing the special circumstances in that case. The Court did consider, among other things, both the state's and the taxpayer's burdens in finding that the state did not have in operation a satisfactory scheme for postdeprivation relief.

Important facts and circumstances surrounding *McKesson*, where a predeprivation tax exaction might be acceptable only with due process safeguards, are clearly distinguishable from the Foundation's situation where prereview deprivation does not meet Constitutional standards. First, *McKesson* involved an excise tax assessment, that is, an assessment for tax monies which are at least partially, if not completely, due and owing to the state, and monies for which the state has no lien or other means to protect its economic scheme and its fiscal interests except to require prereview deprivation. Second, excise taxes are taxes which are intended to be imposed on entities which are in business for a profit and have a ready cash flow. Third, no irreparable harm would result to the Florida taxpayer in that case by providing postdeprivation remedies.

The Foundation's situation in the instant case, which is clearly distinguishable, emphasizes the absolute need for predeprivation safeguards. The only way to protect the Foundation's due process rights is through predeprivation safeguards. First, in the Foundation's case we are dealing with ad valorem property taxes, where the economic interest of the state is already well protected because of the state's lien on the property. Second, the Foundation is a nonprofit entity which is not in business to make money, and does not have abundant cash flow available to make prereview payments of the taxes it is contesting under its claim to entitlement

to an exemption. Third, postdeprivation remedies do not safeguard due process rights because the Foundation will suffer the irreparable harm of having its real estate sold. Fourth, the disputed funds in *McKesson* were state funds being collected by the business, similar to sales taxes, whereas ad valorem tax funds belong to the private entity until extracted by the government, similar to income taxes.

This Court has invalidated state tax legislation after considering the practical effect such state laws have on the due process rights of taxpayers. In *New Jersey Insurance Co. v. Division of Tax Appeals*, 338 U.S. 665 (1950) this Court stated that its inquiry must involve consideration of the practical operation and effect of the tax legislation and found that the practical effect of the state tax in that case denied taxpayers their due process rights.

Likewise in this case, when the practical effects of O.C.G.A. Sec 48-5-29(a) are observed, Georgia's postdeprivation measures do not satisfy the Due Process standards set forth in *McKesson*, because for the Foundation, as for any other impoverished entity, prereview payment followed by postdeprivation relief is not a viable option. Prereview payment is impossible for the Foundation. The Foundation does not have the funds to pay the tax assessed, next bring its appeal, and then hope to qualify for postdeprivation relief. The Foundation is a nonprofit entity which is ready, willing and able to prove that by Georgia law the ad valorem tax assessment is in error, but it cannot afford to exercise its right to a judicial review under the requirements of O.C.G.A. Sec. 48-5-29(a).

Based on the logic in *McKesson*, and considering the practical effect of the operation of the Georgia law in the case of the Foundation, a predepriva-

tion safeguard in the form of judicial review of tax appeals without a prereview payment of taxes is the only acceptable safeguard for impoverished, non-profit entities contesting their ad valorem taxes, and O.C.G.A. Sec. 28-5-29 (a) should be stricken as unconstitutional.

B.- O.C.G.A. SEC. 48-5-29(a) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT WHEN APPLIED TO IMPOVERISHED ENTITIES.

Although O.C.G.A. Sec. 48-5-29 (a) appears on its face to affect all taxpayers equally, in fact, in its application it is discriminatory. "A law nondiscriminatory on its face may be grossly discriminatory in its operation." *Williams v. Illinois*, 90 S. Ct. 2018, 399 U.S. 235 (1970). As applied, O.C.G.A. Sec. 48-5-29(a) discriminates against impoverished taxpayers that cannot afford to pay large tax claims before qualifying for a judicial appeal. This discrimination against impoverished taxpayers operates as a denial of their right to appeal and results in a loss of the subject property. This discrimination is clearly in violation of the Equal Protection Clause of the Fourteenth Amendment.

This Court has recognized the sanctity of the right to appeal many times. "Where a state provides appellate review, it cannot be granted to some litigants, and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Lindsey v. Norment*, 92 S. Ct. 862, 405 U.S. 56 (1972). In *Lindsey* the Court addressed the constitutionality of an Oregon State Forcible Entry and Wrongful Detainer Statute which required that a defendant who lost in the district court and wished to appeal had, inter alia, to give an undertaking with two sureties for payment of twice the rental of the

premises. This Court found that the statute arbitrarily discriminated against tenants wishing to appeal in heavily burdening the statutory right to appeal, and that the prepayment requirement was not necessary to effectuate the state's purpose of preserving the property at issue. As applied, O.C.G.A. Sec. 48-5-29(a) not only heavily burdens taxpayers' right to appeal, it totally deprives impoverished taxpayers of their right to appeal. This drastic result is not necessary to preserve the state's interest in the subject property because the state already has the benefit of its statutory priority lien on the property.

The operation of O.C.G.A. Sec. 48-5-29(a) results in further devastating ramifications for impoverished entities like the Foundation: in addition to being deprived of their right to appeal, they are subjected to the irreparable injury of the loss of their real property, a unique asset, through forced sales. Aggrieved impoverished property owners have no choice but to endure these irreparable injuries, while aggrieved wealthy property owners are merely burdened or inconvenienced by the prereview payment which they can afford. The impact of O.C.G.A. Sec. 48-5-29(a) and similar laws in other states on impoverished property owners raises serious due process and equal protection considerations, and runs contrary to the basic principle of fairness which is the very essence of our Bill of Rights.

While O.C.G.A. Sec. 48-5-29(a) discriminates on the basis of wealth, which by itself is not a suspect classification, the operation of this discriminatory statute so impacts taxpayers' basic right to appeal and thus their basic property rights, that analysis under the strict scrutiny test is appropriate. In *Speiser v. Randall*, 357 U.S. 513 (1958) this Court found due process procedures lacking in state actions to deny taxpayer's exempt status where tax-

payer's basic right of free speech was at stake. In *Speiser*, this Court stated that just because a case involves state taxing procedures with which Federal Courts are reticent to interfere, it does not follow that those ordinary state tax procedures are allowed to violate basic Constitutional rights. Similarly, in the case of the Foundation where the basic right to appeal and fundamental property rights are at stake, higher standards than those applied to ordinary tax assessment procedures (subjected usually only to the rational scrutiny test) are mandated.

In *Speiser* this Court has also declared, "In practical operation, therefore, this procedural device must necessarily produce a result which the state could not command directly." *Speiser* at 526. Likewise, O.C.G.A. Sec. 48-5-29(a) in practical operation necessarily produces a result (eliminating the right of appeal for impoverished taxpayers) which it could not command directly. Pursuant to the strict scrutiny test which is called for on the instant case, a challenged law is considered invalid if it is not found to be demonstrably necessary to a compelling state objective and there does not appear to be a less restrictive means available. *Bernal v. Fainter*, 104 S. Ct. 2312, 467 U.S. 216 (1984). Clearly, O.C.G.A. Sec. 48-5-29 (a) fails under that analysis.

In *McKesson* this Court addressed the issue of the state's objectives and acknowledged the interest of the state in sound fiscal planning. However, the Court in *McKesson* also recognized that sound fiscal policy and financial stability cannot be implemented at the expense of the taxpayers' fundamental rights. In this case, Georgia's need for sound fiscal planning and financial stability are legitimate interests, but they must be accomplished in a fashion that does not deprive impoverished taxpayers unnecessarily of their property or their right to

appeal.

The prereview tax payment practice is not the only way for the state to assure financial stability and sound fiscal policy. For example, a penalty could be assessed for frivolous tax appeals, or the Tennessee method of requiring only that the undisputed portion of a tax bill be paid before review could be adopted. The prereview payment requirement is particularly illogical and objectionable when applied to entities which claim to be exempt and therefore are not likely to be paying taxes at all. Thus, several of the state laws which require prereview payment, including those in Illinois and New Jersey, provide exceptions from the prereview payment requirement for entities claiming tax exempt status.

This Court urgently needs to decide whether O.C.G.A. Sec. 48-5-29(a), as applied, is unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States in intentionally discriminating against impoverished taxpayers while being neither the least restrictive nor the most expedient means of implementing and securing the state interest. At least, O.C.G.A. Sec. 48-5-29(a) should be more narrowly tailored to exclude exempt entities and entities claiming exempt status. Ideally, O.C.G.A. Sec. 48-5-29(a) and the similar laws in other states should be invalidated to the extent that their application would be likely to cause unnecessary irreparable harm to any aggrieved taxpayer.

II. NOTICE BY PUBLICATION OF COURT PROCEEDINGS, AS PERMITTED IN UNIFORM SUPERIOR COURT RULE 8.3, FAILS TO MEET DUE PROCESS STANDARDS FOR OUT-OF-STATE, PRO SE LITIGANTS WHOSE ADDRESSES ARE KNOWN.

The judicial tax appeal involved in this case was certified to the DeKalb County Superior Court on 22 January 1991. On 29 March 1991 the DeKalb County Board of Tax Assessors filed its Motion to Dismiss based on the Constructivist Foundation's noncompliance with O.C.G.A. Sec. 48-5-29(a). A hearing on the Motion to Dismiss was scheduled for 8 April 1991. Notice of the hearing was provided to parties only by means of publication in a local newspaper, apparently in compliance with Georgia State Uniform Superior Court Rule 8.3 which provides that the calendar clerk is to prepare the trial calendar, deliver it to the clerk of the court, and "distribute" or "publish" it in a sufficient period of time .....prior to the session of court at which the actions listed thereon are to be tried.

The Foundation first received its copy of this motion on 3 January 1992, as it had been mailed to an incorrect post office box number in Washington, D.C. The Foundation thus had absolutely no notice that a motion to dismiss had been filed until it received the order of dismissal in the mail on 1 May 1991. Likewise the Foundation had absolutely no notice that there was a hearing on the motion to dismiss scheduled for 8 April 1991, as the Foundation's principle offices are located in Maryland where there is no ready access to court dockets published in a local DeKalb County newspaper. At no time was any hint given to the Foundation that any official notifications would be made except by the direct communication by mail as had been done

repeatedly over four years. The hearing was held on 8 April 1991, in the absence of the Foundation, and the Motion to Dismiss was granted based on the Foundation's noncompliance with O.C.G.A. Sec. 48-5-29(a) and its failure to appear in court on that day.

The type of notice provided to the Foundation regarding the hearing of 8 April 1991 does not satisfy due process standards as clearly established by this Court. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated .....to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1949). The due process standard delineated in *Mullane* applies to the hearing notice on the motion to dismiss in the Foundation's case. A hearing on a motion to dismiss is unquestionably a "proceeding to which is to be accorded finality." What could be more final than a dismissal with prejudice? Yet, under no stretch of the imagination could notice by publication in a minor, local DeKalb County newspaper be considered "reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" in the Foundation's case. The Foundation, the party with the most at risk, i.e., dismissal, was located out-of-state, without ready access to local DeKalb County publications featuring DeKalb County court dockets. Clearly, notice by publication, as permitted in Georgia Uniform Superior Court Rule 8.3, does not satisfy the *Mullane* due process standard as applied to the facts and circumstances surrounding the obscure notice by publication in the Foundation's case.

Another case clearly in point, *City of New York*

v. New York, New Haven & Hartford Railroad Co., 344 U.S. 293 (1953) further supports the Foundation's argument. In *New York* the Court held that notice by publication in a newspaper of a bankruptcy bar order requiring creditors to file their liens did not provide reasonable notice to New York City under the circumstances in that case. The notice by publication had been made pursuant to Sec. 77 (c) (8) of the Bankruptcy Act which provided that the "judge shall cause reasonable notice of the period in which claims may be filed,....by publication or otherwise."

In discussing the circumstances invalidating notice by publication in *New York*, this Court cited *Mullane* for the proposition that notice by publication, the justification of which is difficult at best, is a poor and sometimes hopeless substitute for actual service of notice, although necessity may cause a resort to publication when the names, interests and addresses of persons are unknown. *New York*, at 296, *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951). In *New York*, this Court found that no such necessity for notice by publication existed where the name, interest and address for the creditor, New York City, were well known. Likewise, in the instant case of the Foundation, the DeKalb County Superior Court, the DeKalb County Board of Tax Assessors, and the DeKalb County Attorney's office all knew very well who the Foundation was, what its interest was, and what its out-of-state address was because they all had been in constant communication with the foundation by mail for official notices and by telephone for informal contacts. No reasonable excuse, much less the necessity excuse as required by this Court, existed for notification of the Foundation solely by means of publication.

CONCLUSION

After *McKesson* many of the traditional considerations previously associated with the analysis of due process and equal protection issues arising out of state tax legislation have become obsolete. The prereview payment requirement as a condition precedent to a court assuming jurisdiction to entertain an appeal of an ad valorem tax assessment does not satisfy due process standards under *McKesson*, when applied to impoverished taxpayers or entities claiming exempt status.

A wide divergence presently exists among states in the manner in which these tax appeals are handled. Statutes like O.C.G.A. Sec. 48-5-29(a), which arbitrarily apply the prereview payment requirement to all taxpayers, including those claiming to be exempt, must be stricken. This Court needs to clarify the distinction between situations where prereview payment requirement of contested taxes is permissible as not being a violation of Constitutional rights, and those situations where, as in the case of the Foundation, a prereview payment requirement is unconstitutional.

The Superior Court of DeKalb County erred dismissing Petitioners case with prejudice on the basis of Petitioner's failure to comply with O.C.G.A. Sec 48-5-29(a) and failure to appear at a hearing for which the sole notice was an obscure item in a local DeKalb newspaper. The Supreme Court of Georgia erred in affirming the dismissal by the Superior Court, notwithstanding Petitioner's having raised before that Court an abundance of Constitutional objections to the Georgia tax appeal and Superior Court's notification procedures. For the various reasons cited above which have extensive impact

and are of critical importance, this petition for certiorari should be granted.

Respectfully submitted by

Paula Fitzgerald Wolff, Esq.
11489 Lake Potomac Drive
Potomac, Maryland 20854
301-299-2920
Counsel for Petitioner,
Constructivist Foundation, Inc.

23 April 1992

APPENDIX

I. THE RELEVANT JUDGMENTS AND ORDERS APPEALED FROM ARE THE FOLLOWING:

A. LEE FOUNDATION, INC. v. DEKALB COUNTY BOARD OF TAX ASSESSORS; THE SUPERIOR COURT OF DEKALB COUNTY, STATE OF GEORGIA:
CIVIL ACTION NO. 91-1646-4;
FINAL ORDER:

It is hereby ordered that this case is dismissed on the ground that the Superior Court does not have jurisdiction of the appeal due to Plaintiff's failure to comply with O.C.G.A. Sec.48-5-29(a). Additionally, this case is dismissed for want of production, as the Plaintiff did not appear at the call of the calendar on April 8, 1991 at 9:30 a.m.

Order signed 8th day of April, 1991 by Judge C. W. Hunstein.

B. LEE FOUNDATION, INC. V. DEKALB COUNTY BOARD OF TAX ASSESSORS; IN THE SUPREME COURT OF GEORGIA;
CASE NO. S91A 1225;
PER CURIAM:

Judgment affirmed without opinion pursuant to Rule 59. Clarke, C.J., Weltner, Bell, Hunt, Benham and Fletcher, J.J., and Judge Philip F. Etheridge concur; Smith, P.J., not participating.

Decided: November 27, 1991.

C. LEE FOUNDATION, INC. V. DEKALB COUNTY BOARD OF TAX ASSSESSORS; IN THE SUPREME COURT OF GEORGIA;
CASE NO. S91A 1225;
ORDER:

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

Clarke, C.J., Weltner, Bell, Hunt, Benham and Fletcher, J.J., and Judge Philip F. Etheridge concur; Smith, P.J., not participating.

Order passed December 18, 1991.

II. THE CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED ARE THE FOLLOWING:

U.S. Constitution, Amendment V :

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.Constitution, Amendment XIV, Section 1 :

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. 1257 (a) (STATE COURTS; CERTIORARI) :

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

U.S.Supreme Court Rule 29.1 (FILING AND SERVICE OF DOCUMENTS; SPECIAL NOTIFICATIONS) :

Any pleading, motion, notice, brief, or other

document or paper required or permitted to be presented to this Court, or to a Justice, shall be filed with the Clerk. Every document, except a joint appendix or brief amicus curiae, filed by or on behalf of one or more corporations, shall include a list naming all parent companies and subsidiaries (except wholly owned subsidiaries) of each corporation. This listing may be done in a footnote. If there is no parent or subsidiary company to be listed, a notation to this effect shall be included in the document . If a list has been included in a document filed earlier in the particular case, reference may be made to the earlier document and only amendments to the listing to make it currently accurate need to be included in the document currently being filed.

Georgia Statute O.C.G.A. Sec. 48-5-29 (a) (PAYMENT OF AD VALOREM PROPERTY TAXES CONDITION PRECEDENT TO SUPERIOR COURT JURISDICTION IN PROPERTY TAX LITIGATION) :

Before the superior court has jurisdiction to entertain any civil action, appeal, or affidavit or illegality filed under this title by any aggrieved taxpayer concerning liability for ad valorem property taxes, taxability of property for ad valorem property taxes, valuation of property for ad valorem taxes, or uniformity of assessments for ad valorem property taxes, the taxpayer shall pay the amount of ad valorem property taxes assessed against the property at issue for the last year for which taxes were finally determined to be due on the property.

Georgia Statute O.C.G.A. Sec. 48-5-311(f)(1): (REVIEW OF ASSESSMENTS; COUNTY BOARDS OF EQUALIZATION) :

(1) The taxpayer or, except as otherwise provided in this paragraph, the county board of tax assessors may appeal decisions of the county board of equalization to the superior court of the county in which the property lies. A county board of tax assessors may not appeal a decision of the county board of equalization changing an assessment by 15% or less unless the board of tax assessors gives the county governing authority a written notice of its intention to appeal and within ten days of receipt of the notice the county governing authority

by majority vote does not prohibit the appeal. In the case of a joint city-county board of tax assessors, such notice shall be given to the city and county governing authorities, either of which may prohibit the appeal by majority vote within the allowed period of time.

Georgia State Uniform Superior Court Rule 8.3 (TRIAL CALENDAR):

The calendar clerk shall prepare a trial calendar from the actions appearing on the ready list, in the order appearing on such list. The calendar shall state the place of trial and the date and time during which the actioins shall be tried. The trial calendar shall be delivered to the clerk of the court and distributed or published a sufficient period of time, but not less than 20 days, prior to the session of court at which the actions listed thereon are to be tried.

The Bankruptcy Act of 1935, Sec. 77(c)(8), 47 Stat. 1474, as amended, 49 Stat. 911, 11 U.S.C. Sec. 205, (repealed):

The judge shall cause reasonable notice of the period in which claims may be filed ....by publication or otherwise.

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Supreme Court, U.S.
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(2)

No. 91-1712

In The

Supreme Court of the United States

October Term, 1991

CONSTRUCTIVIST FOUNDATION, INC., F/K/A LEE FOUNDATION, INC.,

Petitioner,

v.

DEKALB COUNTY BOARD OF TAX ASSESSORS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

ALBERT SIDNEY JOHNSON
1300 Commerce Drive
5th Floor
Decatur, Georgia 30030
(404) 371-3011
Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Does Georgia Statute O.C.G.A. §48-5-29 which is equally applied to all taxpayer appellants and which provides for a clear and certain post-deprivation remedy for such aggrieved taxpayers violate their constitutional rights?

II. Is the government Defendant in an ad valorem property tax appeal proceeding obligated to inform the taxpayer Plaintiff of the laws which set forth when the Plaintiff's case will be placed on the trial calendar?

STATEMENT OF THE CASE

This case is an ad valorem property tax appeal filed pursuant to Georgia Statute O.C.G.A. §48-5-311. Contrary to the Petitioner's assertions in its brief that "the standard procedures" in tax appeals is that the "DeKalb County Attorney's Office filed the initial suit papers in the Superior Court as a service to the taxpayer", the record in this case is notably absent of any such facts. The record indicates that when the case was filed in Superior Court, Petitioner was sent a letter from the Superior Court Clerk's Office dated January 22, 1991, which stated that Petitioner could contact the Judge's calendar clerk at a specific phone number for information concerning the case. Petitioner completed the "Civil Case Initiation Form" which was filed on February 27, 1991 and on it indicated that a related case was assigned to Judge Hunstein. Consequently, the instant case was reassigned to Judge Hunstein and came on for trial during the March/April term of court on April 8, 1991. At that time, Petitioner did not appear at the call of the trial calendar, and case was dismissed by the trial court for want of prosecution and for failure to comply with O.C.G.A. §48-5-29 which sets forth the jurisdictional requirements for a tax appeal in Superior Court.

ARGUMENT
REASONS FOR DENYING THE WRIT

This Court should deny the Petition for a Writ of Certiorari because this Court's own prior decisions are

controlling, and because Petitioner's arguments are without merit, and because the decision below was based upon issues of state law.

In *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, et al.*, 110 S.Ct. 2238 (1990) this Court clearly established what due process is required to be given to taxpayers by the State. Namely, the due process clause requires the State to afford taxpayers meaningful postpayment relief for taxes already paid pursuant to the state tax law. The meaningful postpayment relief, (i.e., the "clear and certain remedy") which does satisfy due process is in the nature of a refund action for any overpayment of taxes. Only if a state refused to pay back the unlawful taxes would there be a deprivation of due process rights. "It is well established that a State need not provide predeprivation process for the exaction of taxes." *McKesson, supra.*

In *Redding Ford v. California State Board of Equalization*, 722 F.2d 496 (C.A. Cal. 1983), *cert. denied*, 469 U.S. 817, 105 S.Ct. 84 (1984), it was held that California's prepayment refund requirement which prevented state relief because the taxpayer demonstrated that it did not have sufficient assets to pay the assessments did not avoid the jurisdictional bar of the Tax Injunction Act, 28 U.S.C.A. §1341, which was designed to give relief in situations in which there is no plain, speedy, and efficient remedy under state law. This Court's refusal to grant certiorari in *Redding Ford, supra,* indicates that the prepayment refund procedure, even when it prevents taxpayers who are unable to prepay their assessments from obtaining state relief, is a plain, speedy and efficient remedy which satisfies procedural due process requirements.

Petitioner incorrectly asserts that the statutory law in Georgia regarding tax appeals is unconstitutional as violating the equal protection clause. This issue is a matter of state law which has already been decided by the Georgia appellate courts. In *Hancock v. Board of Tax Assessors of Harris County*, 226 Ga. 570, 176 S.E.2d 102 (1970) the Court held that the right of appeal for a taxpayer is not absolute and noted that no section of the State Constitution specifically provides for an appeal. The Court also held that the General Assembly has constitutional authority to enact laws which place conditions upon appeals, and when such conditions are equally applied to all persons, the statute providing therefor is not violative of the equal protection clause. The statutory requirement of the prepayment of taxes before a case may reach the Superior Court is applied to all taxpayers equally, and as stated in Petitioner's brief, wealth is not a suspect class which would trigger strict scrutiny.

This Court has already held that "All citizens are presumptively charged with knowledge of the law." *Texaco Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781 (1982). When a rule of law uniformly affects all similarly situated citizens, an individual need not be given advance notice before the rule may operate.

O.C.G.A. §48-5-311(f)(4)(A) states in pertinent part that a tax appeal "shall be heard before a jury at the first term following the filing of the appeal." The terms of court in DeKalb County, Georgia where Petitioner's property is located are set forth in O.C.G.A. §15-6-3(37) which states that they commence on the first Monday in January, March, May, July, September and November. Pursuant to Georgia law, Petitioner's case was set for trial

during the March/April term following the filing date of January 22, 1991. The record indicates that upon filing Petitioner was provided by letter with a telephone number to contact regarding its case.

It is well established law that due process does not require the government to notify individuals of the existence of bars to litigation. *E.E.O.C. v. Pan American World Airways, Inc. v. King v. Certain Claimants,* 897 F.2d 1499 (9th Cir. 1990) *cert. denied,* 111 S.Ct. 55 (1990).

In short, the issue concerning notice which the Petitioner has attempted to raise is governed by previous cases of this Court and is not of sufficient importance to warrant this Court's attention.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALBERT SIDNEY JOHNSON
1300 Commerce Drive
5th Floor
Decatur, Georgia 30030
(404) 371-3011
Attorney for Respondent

Supreme Court, U.S.
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No. 91-1712

IN THE

Supreme Court of the United States

October Term 1991

CONSTRUCTIVIST FOUNDATION, INC., F/K/A LEE FOUNDATION, INC.

Petitioner,

v.

DEKALB COUNTY BOARD OF TAX ASSESSORS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF THE LINCOLN CENTER FOR LEGAL STUDIES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

William A. Stanmeyer,
325 Club View Drive
Great Falls, VA 22066
(703) 759-5227 or -3432
President and Counsel
for Lincoln Center for
Legal Studies, Inc.

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Georgia Supreme Court's decision directly conflicts with this Court's *McKesson* standard of "procedural safeguards" which necessarily include fair notice.

2. Whether requiring an impoverished taxpayer to pay a tax before he may obtain judicial review of that tax violates fundamental principles of administrative law and would lead to increased and unreviewable, arbitrary conduct by tax collecting agencies.

3. Whether a state law which forces a taxpayer to submit to a tax sale a mortgaged property in order to prepay the tax to qualify for a judicial appeal deprives the taxpayer of the "clear and certain remedy" required by *McKesson*.

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IN THE

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October Term 1991

CONSTRUCTIVIST FOUNDATION, INC., F/K/A
LEE FOUNDATION, INC.

Petitioner,

v.

DEKALB COUNTY BOARD OF TAX ASSESSORS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF THE LINCOLN CENTER FOR LEGAL STUDIES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Lincoln Center for Legal Studies, Inc., submits this brief as *amicus curiae* in support of the Petition for Writ of Certiorari to the Georgia Supreme Court filed by the Constructivist Foundation. The petitioner and respondent have consented to the filing of the brief. Their consent letters have been filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

The Lincoln Center for Legal Studies, Inc., is a non-profit, educational corporation incorporated in 1974 in the District of Columbia for the pur-

poses of providing legal education and promoting the improvement of, and public understanding of, the Anglo-American legal system. The Internal Revenue Service has ruled that the corporation is tax-exempt and that donors may treat their contributions thereto as tax-deductible.

The Lincoln Center has sponsored and administered seminars and "continuing legal education" programs, sponsored research and writing, and collaborated with such accredited law schools as Indiana and Delaware Law School in administering semester-long legal education programs for law students in Washington Intern programs. The Lincoln Center has no endowment or other source of regular income; it relies exclusively on contractual fees, foundation grants, and private donor support. To reduce overhead, the corporation has relocated to northern Virginia. During the present recession, contributions have dried up. In terms of financial resources, the corporation's position is similar to that of Petitioner: it is impoverished.

The interest of the Amicus is two-fold. First, this case falls squarely within the Lincoln Center's corporate purpose -- to improve the legal system in the United States. Maintaining and improving the fairness of the legal system is central to improving the system as a whole. The issue whether impoverished persons or entities must pay a challenged tax before they may have a judicial determination whether that tax was properly assessed is fraught with questions of fairness. This case presents an opportunity to refine constitutional notions of fairness, and thus substantially to contribute to the jurisprudence of Due Process and "Equal Justice Under Law."

Second, as a practical matter, the Lincoln

Center is among those hundreds of small non-profit corporations which lack resources to pay any significant tax. Should this Court allow the State of Georgia's ruling, adverse to the Constructivist Foundation, to stand, there is a real possibility that the District of Columbia could impose additional taxes on non-profits such as this Amicus. Unlike some jurisdictions, the District of Columbia does not permit waiver for lack of funds to pay before judicial challenge. The District, as most other jurisdictions, is desperately searching for additional revenue for its strained budget during the recession. If waiver of prepayment of a contested tax by impoverished non-profits does not become the universal rule, the Lincoln Center could well become the next victim of taxing authorities demanding funds from groups which have none.

INTRODUCTION AND SUMMARY

In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, et al*, 110 S.Ct. 2238 (1990), this Court ruled that a State must provide procedural safeguards against an unlawful tax exaction because such exaction constitutes a deprivation of property under the Due Process Clause. The Court also held that when a state penalizes taxpayers for failure to remit taxes in a timely fashion, thus requiring them to pay first before obtaining judicial review of the tax's validity, federal due process principles require that postdeprivation procedure provide "clear and certain remedy" of deprivation of tax moneys in an unconstitutional manner.

In the present case, the Georgia courts have failed to meet Due Process requirements by failing to provide Petitioner Constructivist Foundation with reasonable and adequate notice of the hear-

ing in the judicial appeal of the administrative tax proceedings, and by insisting that Petitioner, a non-profit charitable corporation, comply with the State of Georgia requirement of prepayment of tax assessment before judicial hearing on the merits of that assessment. Whether or not valid on its face, this prepayment requirement, as applied to an impoverished individual or nonprofit corporation, renders the Due Process right of judicial review a hollow promise devoid of practical meaning.

First, the aggrieved impoverished taxpayer is caught in a "Catch-22" situation: it cannot pay the tax it challenges; yet it cannot obtain judicial determination whether its challenge is valid until it pays.

Second, the requirement of prepayment effectively excludes from the protection of judicial review of a challenged tax the very class of persons, the poor, who most need judicial protection. By closing the door to the protections available through judicial review, the State of Georgia effectively establishes the County Board of Equalization, an administrative agency, as final arbiter both of (a) the propriety of imposing a tax on a nonprofit corporation at all, and of (b) the justification of the amount of the tax. To constitute an administrative tax-collecting body as sole judge of the propriety of its own actions is not consonant with the jurisprudence of American law in general and with a long history of constitutional law/administrative law cases requiring Court oversight of agencies.

Third, in the instant case, the postpayment retroactive remedy, viz., the possibility of recovering a prepaid tax when a court later rules that tax

invalid as applied to the taxpayer, is not adequate in this case. If the property to be taxed is sold at a tax sale, the mortgagee can accelerate the loan on the property and require full payment. Should payment not be made -- and clearly in this case the poverty of the mortgagor nonprofit corporation would preclude paying the loan in one lump sum -- the mortgagee can use the tax sale to recoup some or all of its loan. If later, a court determines the tax invalid, as the Petitioner urges, and orders reimbursement of the collected tax, the court cannot order the mortgagee to reinstate the loan.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted for several reasons. First, the Supreme Court of Georgia's affirming, without opinion, the Superior Court dismissal of Petitioner's tax appeal, amounts to an endorsement of a State tax assessment method which, as applied to Petitioners in this case, offends the Due Process Clause of the federal Constitution. The issue of fairness to profit-making businesses where a taxpayer challenges a tax was squarely before this Court in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, et al*, 110 S.Ct. 2238 (1990), only two years ago. That case ruled that a State must provide "procedural safeguards" against unlawful tax exaction because such tax is a deprivation of property under the Due Process Clause. *A fortiori*, non-profit corporations are due the same "procedural safeguards." But in this case, the aggrieved nonprofit taxpayer did not enjoy such safeguards. And Due Process defects are not cured by the State Supreme Court's affirming the defective process without explanation, although Petitioner specifically requested an opinion in

order to clarify the issues for appeal to this Court.

Second, if the decision below is allowed to stand, it will support the proposition that administrative bodies may shelter their decisions from judicial scrutiny by the simple expedient of requiring the party aggrieved by those decisions to pay not merely a filing fee or bond but the full exaction the agency decision imposed. In the case of arguably illegal taxes, the tax collector's *de facto* autonomy is particularly fraught with potential for abuse. Under American administrative law principles, the final arbiter of complaints about an agency's action cannot be that agency itself. It must be the appropriate Court.

Third, the possibility of postpayment, retroactive remedy, viz., recovering the prepaid tax when a court later upholds the taxpayer's challenge to the tax, does not, in this case, meet the *McKesson* requirement of a "clear and certain remedy" for unconstitutional deprivation of tax moneys [emphasis added]. An impoverished taxpayer must suffer the forced sale of the property, with certainty that his mortgagee will foreclose to recoup its loan. Whether a forced sale generates enough funds to pay the tax, one cannot anticipate whether it will also pay off the mortgage; in any event, the one-year-right-of-buy-back from the purchaser at a forced tax sale does not mandate that the mortgagee reinstate the loan. Thus the tax sale, which might prove to have been invalid, will trigger foreclosure and loss of the property.

A. The Georgia Supreme Court's Decision Directly Conflicts With This Court's *McKesson* Standard of "Procedural Safeguards" Which Necessarily Include Fair Notice.

In *McKesson Corp., supra*, this Court ruled that

a State must provide procedural safeguards against an unlawful tax exaction because such exaction constitutes a deprivation of property under the Due Process Clause. "Procedural safeguards" necessarily import reasonable or adequate notice. But the Georgia State taxing authorities relied on their local Court's notice-by-local-publication in Georgia when they knew that Petitioner Constructivist Foundation has its offices in Maryland. When the stakes are the possible deprivation of property variously valued between $750,000 and almost $1.5 million, notice by publication in the DeKalb town paper was procedurally far from sufficient to permit Petitioner, located hundreds of miles away, knowledge of an hearing in Petitioner's suit appealing the administrative tax proceedings.

The local Superior Court, fully aware of Petitioner's earlier objections to the tax because of its appeals of prior assessments, cannot reasonably conclude that it had no obligation, stemming from Due Process considerations of fairness, to make sure that Petitioner obtained its "day in Court." There is no "procedural safeguard" of a taxpayer's right to contest unlawful taxes when the local Court collaborates with the tax collector in doing no more than run a small newspaper notice in a paper hundreds of miles from the taxpayer. Such a "safeguard" does not make the taxpayer safe; it is not the process that is "due" when one stands to lose substantial property.

A "notice" which is known not to notify is just a trick, used to disguise this local government's unilateral confiscation of out-of-State person's property with the cosmetic appearance of propriety. It is not Due Process.

B. Requiring an Impoverished Taxpayer to Pay a Tax Before He May Obtain Judicial Review of that Tax Violates Fundamental Principles of Administrative Law and Would Lead to Increased and Unreviewable Arbitrary Conduct By Tax Collecting Agencies

The primary rationalization of the State's position is the Petitioner's failure to prepay the contested tax, as a precondition of being admitted to Court to contest the tax. *McKesson* permitted this approach where adequate postpayment reimbursement remedies existed, for those taxpayers who, having prepaid the contested tax, later prevailed in court.

However, *McKesson* did not address the issue whether this approach violates fundamental principles of administrative law in the case where a non-profit taxpayer cannot, because of poverty, prepay the tax. Yet, upon scrutiny it is clear that to require the taxpayer to pay whatever tax the tax-assessment agency wishes to impose, before he may obtain independent review of the rightfulness of that tax, is to give the taxing agency *carte blanche* to do what it wants and, indeed, to encourage it to be even more arbitrary. In the present case, the tax collector has determined, in the face of the Petitioner's nonprofit status and impoverished condition, that (a) it has the right to collect the tax just as if the taxpayer were a profit-making entity; (b) that the valuation of the property is roughly $1,500,000, even though the taxpayer has an independent appraisal of $750,000; and (c) the correct tax, for certain years in question, totals approximately $75,000. These determinations the taxpayer argues are arbitrary and improper. But the State's position is that the

taxpayer may obtain an independent review, by a court, of its tax-collecting agency's decisions only if it first pays the tax.

Under American administrative/constitutional law principles, the final arbiter of an agency's asserted arbitrary conduct cannot be that agency itself. It must be a court. The United States Supreme Court has repeatedly emphasized with regard to fundamental rights that judicial action possesses a degree of security superior to administrative action. 1 Am.Jur. 2d *Administrative Law* Section 17 (1964). Particularly with regard to the constitutional rights of persons, the judicial process aims to provide security and safeguards where expediency is served by the expertise and absence of rigidity of the administrative process. Id. at Section 19. Also see, Id. at Section 16.

The blatant abuses allowed by the Georgia tax appeal system will become obvious if we recast the facts slightly and assume that the taxpayer could pay the $75,000, but that this amount were the absolute limit it could pay. Then, at least on the face of it, the evil of conditioning access to the courts on the aggrieved party's ability to pay would be less apparent. But all the taxing agency need do, then, to avoid judicial review of its self-declared power to tax non-profit entities would be to raise the tax due even more by using a self-invented valuation far above private appraisals. The tax collector need only set the valuation so high that the taxpayer could not pay the proportioned tax, and it would have effectively kept the taxpayer from judicial review of the abuses.

In other words, the more arbitrary the tax collection agency became, the less likely would it be that a court could review its arbitrariness! If this

Court upholds the Georgia Supreme Court by denying certiorari, it will, in effect, be creating an incentive for administrative agencies throughout the United States, particularly tax collectors, to be more arbitrary, rather than less. Yet preventing governmental arbitrariness in dealing with its citizens, especially when it takes their property -- as taxation does -- is perhaps the essence of due process.

The constitutional guaranty of due process of law applies to, and must be observed in, administrative as well as judicial proceedings. *Galvan v. Press*, 347 U.S. 522 (1953). But a system which rewards increased arbitrariness with decreased judicial review guarantees administrative independence from the very courts charged with insuring due process in administrative proceedings. In such a situation, due process protection through judicial review is purely illusory.

The taxing agency becomes a law unto itself. The Georgia Supreme Court endorsed (without opinion although specifically requested by Petitioner to provide one in order to clarify the issues for appeal to this Court) procedures which permit the denial to the impoverished taxpayer of a judicial forum in which to challenge those procedures on due process grounds. This denial is achieved by a simple expedient: the tax collector makes the procedure so unfair and its result -- a grossly inflated tax based on a grossly inflated and arbitrary valuation -- so onerous that the impoverished taxpayer has no way to pay the tax so that he can "buy" his way into court to challenge it.

This tax appeal procedure enables the tax collector to prevent an aggrieved taxpayer from chal-

lenging a tax as unfair. It does this by encouraging the tax collector to increase its unfairness to a point beyond the taxpayer's financial ability to enter court to challenge that unfairness. The tax collector simply calculates the taxpayer's ability to pay and then sets the tax well above it. The more unfair the procedure becomes, the less able is the taxpayer to challenge its unfairness! This is just the opposite of Due Process.

C. Where State Law Forces a Taxpayer to Submit to a Tax Sale of a Mortgaged Property In Order To Prepay the Tax Such Procedure Deprives the Taxpayer of the "Clear and Certain Remedy" Required by *McKesson*.

In this case, the Constructivist Foundation lacks the assets to pay the taxes due of over $75,000 on a property variously estimated to be worth $750,000 to $1,500,000. Since the post-tax-collection remedy of repayment can be mandated only by a court finding the tax improper, and since the Petitioner can get into court only by paying the tax, the Georgia procedure in effect requires the taxpayer to submit to a forced tax sale and a consequential mortgage foreclosure.

Such tax sale will only compound, not remedy, the taxpayer's problems -- and render the "clear and certain remedy" all the more chimerical. Consider the possible scenarios:

(i) The tax sale will not bring enough money to pay the full tax allegedly owing. In this case the State takes what it can get and the property owner is left with nothing. Since the full payment has not been made, the precondition of tax payment permitting judicial review of the tax has not been met: taxpayer has no judicial remedy.

He is deprived of his property without Due Process of Law. Even if the tax were blatantly unconstitutional, the taxpayer will not obtain a judicial determination of that claim.

(ii) The tax sale will bring enough money to pay the tax allegedly owing. But to protect its interest, the mortgagee accelerates the loan and demands full payment of the mortgage. Lacking funds to pay even the tax, *a fortiori* the taxpayer cannot also pay the mortgage. The taxpayer defaults. The mortgagee and the taxing authority sell the property; the mortgagee takes whatever is left after the taxing body gets its tax. All equity, which is "property," the taxpayer had in the real estate is lost.

In these two scenarios, the possibility of retroactive repayment of an improperly prepaid tax is a "remedy" without substance. The taxpayer will lose the property even if, should the tax be fully paid through the sale, he eventually gets into to court and proves the tax improper. He may recover the tax but he will lose the asset. Thus he might recover, at best, five to ten percent of the market value of the asset while losing his equity worth many times more than the taxes. Such a Pyhrric victory is no real remedy at all, much less a "clear and certain one" as required for due process protection.

CONCLUSION

For these reasons, as well as the reasons set out in the Constructivist Foundation's Petition, this Court should grant certiorari.

Respectfully submitted,

William A. Stanmeyer
President and Counsel
Lincoln Center for Legal
Studies, Inc.
325 Club View Drive
Great Falls, VA 22066
(703) 759-5227 or -3432

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October Term 1991

CONSTRUCTIVIST FOUNDATION, INC., F/K/A LEE FOUNDATION, INC.,

Petitioner,

v.

DEKALB COUNTY BOARD OF TAX ASSESSORS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION

Paula Fitzgerald Wolff
11489 Lake Potomac Drive
Potomac, Maryland 20854
(301) 299-2920

Counsel of Record
For the Constructivist Foundation, Inc.

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

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REPLY TO RESPONDENT'S OPPOSITION

The Petitioner, the Constructivist Foundation, F/K/A Lee Foundation, respectfully submits the following Reply to Respondent's Opposition to the Petition for Writ of Certiorari in the above entitled case:

I. FACTUAL ISSUES RAISED BY RESPONDENT

A. Service to Taxpayer - Respondent DeKalb County Board of Tax Assessors states that the record is absent of any facts to support Petitioner's contention that Respondent's office filed the initial lawsuit papers in Superior Court "as a service to the taxpayer". Petitioner's contention is

based on oral representations made to it by agents of Respondent. The evidence is clear that the Foundation did not file its lawsuit in the DeKalb Superior Court, but rather that the DeKalb County Attorney filed the Foundation's lawsuit.

B. Letter of 22 January 1991 - The letter advised Petitioner to consult Judge Seeliger's office regarding this case, when in fact the case had been reassigned to Judge Hunstein, which reassignment Petitioner did not learn about until after the case had been dismissed. Furthermore, Petitioner had nothing to discuss with Judge Seeliger's office until it had copies of the initial lawsuit filings, which were never sent to Petitioner although many requests were made.

C. Transfer to Judge Hunstein - Even if Petitioner did have access to and notice of the need to consult the local papers for court dates in its case, it would not have known to look for matters on Judge Hunstein's docket in the newspaper.

II. LEGAL ISSUES RAISED BY RESPONDENT

A. Applicability of *McKesson* - Petitioner has clearly shown in its Petition the relevance of this Court's 1990 decision in *McKesson* to the issues raised by the Foundation. Under the reasoning in *McKesson* post deprivation measures do not meet due process standards in the Foundation's case.

B. *Redding Ford* is not applicable to the Foundation's case - The court in *Redding Ford v. California State Board of Equalization*, 722 F. 2d 496 (C.A. Cal. 1983), cert. denied, 469 U.S. 817, 105 S.Ct. 84 (1984), stated that it was bound by its own 1982 decision in *Wood v. Sargent*, 694 F.2d 1159 (9th Cir. 1982), where the demonstrated inability to pay a tax did not, in the court's opin-

ion, prevent a plain, speedy and efficient remedy in the state courts, and therefore the jurisdictional bar of the Tax Injunction Act, 28 U.S.C. Sec. 1341 applied.

Both of these Ninth Circuit cases predate this Court's 1990 decision in *McKesson*, which resulted in a more definitive analysis of the due process standards which pertain to judicial appeals in tax collection cases. Based on that analysis, this Court needs to provide further guidance to courts hearing cases like the Foundation's -- where an impoverished, non-profit entity claiming to have exempt status is faced with an improper ad valorem tax assessment amounting to many tens of thousands of dollars and where pre-hearing deprivation does not pass due process muster, because it is not a viable option for the purported taxpayer, which never expected to be assessed such taxes and is unable to pay them.

Additionally, *Redding* is distinguishable because it involved sales and use taxes, which like the excise taxes in *McKesson*, are taxes collected by states from profit-making entities, based on their commercial activities -- taxes arguably already owned by the state, which in order to protect its interest must implement pre-hearing deprivation procedures.

C. *Hancock* is not controlling - Respondent cites *Hancock v. Board of Tax Assessors of Harris County*, 226 Ga. 570, 176 S.E. 2d 102 (1970) for the proposition that the statutory law in Georgia regarding tax appeals is not unconstitutional as violating the equal protection clause. The facts and circumstances in *Hancock* hardly resemble those involved in the case of the Constructivist Foundation. Most important, however, under the

Supremacy Clause of Art. VI of the United States Constitution, if a state law is found to conflict with a federal law or the United States Constitution, as Petitioner argues the Georgia Statute does, the federal law prevails. The highest court of the State of Georgia is not the final arbiter of the federal constitutionality of its laws.

Furthermore, while Petitioner agrees with Respondent that Georgia Statute O.C.G.A. Sec. 48-5-29 states that it is a requirement that applies to all taxpayers, Petitioner has shown in its Petition that the statute discriminates against entities which are not able to first pay before being heard in a judicial forum, in violation of the Equal Protection Clause.

D. *Texaco* does not apply - *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) has been cited by Respondent for the proposition that "All citizens are presumptively charged with knowledge of the law." *Texaco*, which also predates *McKesson*, is a mineral rights case and the relevant issue was whether the mineral owner was entitled to advance notice that his mineral interest was about to lapse under the applicable Mineral Rights Act. Knowledge of a statute is not the same as notice of a scheduled court proceeding in which the identities and addresses of parties are well known. In *Texaco* personal notification to mineral owners that their interests were about to lapse was not administratively feasible and thus not required under due process standards.

E. *E.E.O.C. v. Pan American World Airlines* is not controlling. - Respondent cites *E.E.O.C. v. Pan American World Airlines, Inc.*, 897 F. 2d 1499 (9th Cir. 1990) cert. denied, 111 S.Ct. 55 (1990) for the proposition that due process does not require the

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government to notify individuals of bars to litigation. The fact that the court in *E.E.O.C.* determined that the notice provided by the E.E.O.C. to employees of a pending employment discrimination suit satisfied due process standards even though the notice failed to state that recipients had lost their right to bring a private action. This is hardly comparable to notice by publication to a known out-of-state litigant whose address is known, who is not likely to see the local paper, who, if it had access to the local paper would not know to look under the correct judge's name, and whose entire case is likely to be dismissed with prejudice in its absence. Notice by publication in the case of the Constructivist Foundation is, in essence, no notice at all.

The cases and reasoning in Respondent's Opposition having been clearly distinguished and invalidated, this Petition should be granted because of the far reaching and critically important issues involved.

Respectfully submitted,

Paula Fitzgerald Wolff, Esq.
11489 Lake Potomac Drive
Potomac, Maryland 20854
301-299-2920
Counsel for Petitioner
Constructivist Foundation, Inc.

7 June 1992